Chrissy Sportswear, Inc. *and* Boston Joint Board, International Ladies' Garment Workers' Union, AFL–CIO. Cases 1–CA–27215 and 1–CA–27895

September 9, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

Upon a charge filed by the Union on April 5, 1990, in Case 1–CA–27215, the General Counsel of the National Labor Relations Board issued a complaint on May 21, 1990, against Chrissy Sportswear, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. On September 20, 1990, the Respondent filed an answer admitting all the allegations in that complaint.[1]

On October 18, 1990, the Region issued an order withdrawing notice of hearing and dismissing complaint after the Union withdrew its unfair labor practice charge and stated that the parties had reached a private settlement agreement. In its October 18 order, the Region specified that Case 1–CA–27215 could be reinstated if the private settlement agreement were breached.

On December 20, 1990, the Union filed a charge in Case 1–CA–27895, alleging that the Respondent violated Section 8(a)(1) and (5), and requesting that Case 1–CA–27215 be reopened. On January 2, 1991, the Union amended its charge in Case 1–CA–27895. On February 12, 1991, the Regional Director for Region 1 issued an order withdrawing approval of the Union's withdrawal request and reinstating the charge in Case 1–CA–27215.

On February 15, 1991, the General Counsel issued a consolidated complaint in Cases 1–CA–27215 and 1–CA–27895 alleging that the Respondent violated Section 8(a)(1) and (5) of the Act.[2] Although properly served with copies of the charges and consolidated complaint, the Respondent has failed to file an answer.

On May 8, 1991, counsel for the General Counsel wrote the Respondent, its owner, Viarella, its attorney, Joseph P. Foley, and its trustee in bankruptcy, Joseph G. Butler, that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, a timely answer had not been filed. The letters specified that unless an answer was filed by May 17, 1991, a motion for summary judgment would be filed. No answer was filed to the consolidated complaint.[3]

On July 15, 1991, the General Counsel filed a motion to transfer (Cases 1–CA–27215 and 1–CA–27895) to the Board for decision and for summary judgment against the Respondent, with attached exhibits. On July 17, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In his Motion for Summary Judgment the General Counsel contends that the Respondent has failed to file an answer to the consolidated complaint and that, under Section 102.20 of the Board's Rules and Regulations, the Board should find the allegations of the consolidated complaint to be true and issue an order based on those findings. The Respondent did, however, file an answer to the original May 21, 1990 complaint in Case 1–CA–27215. Moreover, one of the allegations in that complaint—the Respondent's failure to make fund contributions beginning October 5, 1989—is incorporated in the February 15, 1991 consolidated complaint.

Although the Respondent's September 20 answer arguably is no longer in effect, given the parties' subsequent settlement agreement and the Region's dismissal of the May 21, 1990 complaint,[4] we need not resolve this issue. Thus, even assuming, arguendo, that the Respondent's September 20 answer was timely and remains in effect, it admits all the allegations in the May 21 complaint. Accordingly, the answer raises no material issues of fact or law warranting a hearing, or ren-

[1] This handwritten answer from the Respondent's owner, John Viarella, admitted all the allegations in the May 21 complaint, including jurisdiction and assertions that the Union was the 9(a) representative of unit employees and that the Respondent failed to make contractually required fringe benefit payments.

[2] The consolidated complaint alleged that the Respondent unlawfully: (1) ceased making fringe benefit payments beginning about October 5, 1989; (2) closed its operations without notifying the Union or affording it an opportunity to bargain over the effects of the closure; and (3) unlawfully interfered with employees' Sec. 7 rights by advising unit employees that it would reopen as a nonunion business.

[3] Although the May 8 letter was not received by the Respondent, which had moved without leaving a forwarding address, it was delivered to Viarella, Foley, and Butler.

[4] In comparable circumstances, the Board has found that an answer to a complaint is not revived where: (1) the parties subsequently enter into a settlement agreement; (2) the settlement agreement is breached; (3) the original complaint allegations are renewed in a consolidated complaint; and (4) no timely answer is filed to the consolidated complaint. See, e.g., *Orange Data, Inc*., 274 NLRB 1018 (1985); *Protection Sprinkler Systems*, 295 NLRB 1072 (1989). In *Orange Data* and its progeny, however, the parties entered into informal settlement agreements approved by the Regional Director and governed by Form NLRB-4775. Form NLRB-4775 specifically provides that approved settlement agreements withdraw outstanding complaints *and* answers. Conversely, here the parties *privately* settled the original complaint in Case 1–CA–27215, and the Region's dismissal of this complaint made no reference to answers filed by the Respondent. Finally, although the Board has held that answers can survive a breached settlement agreement and subsequent unanswered consolidated complaint, this was in circumstances involving informal settlement agreements before Form NLRB-4775 was modified to withdraw answers; moreover, these cases have been narrowly construed. *WUSS Radio*, 236 NLRB 1529 (1978); *Nottingham Restaurant*, 243 NLRB 567 (1979); *Frate Service*, 255 NLRB 163 (1979). But see *Orange Data*, supra, 274 NLRB at 1019 fn. 4.

dering summary judgment inappropriate. *Auburn Die Co.*, 282 NLRB 1044 (1987).

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Boston, Massachusetts, is a contract manufacturer in the garment industry. Annually, the Respondent performs stitching services valued in excess of $50,000 for Dash, Inc. in Boston. Annually, Dash, Inc. sells and ships from its Norwood, Massachusetts location garments valued in excess of $50,000 directly to points located outside the Commonwealth of Massachusetts.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit*

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All nonsupervisory production, maintenance, packing and shipping workers employed by Respondent at its Boston, Massachusetts location, excluding office clerical employees, professional employees, guards and all supervisors as defined in the Act.

Since 1985, and at all times material, the Union has been the designated exclusive representative of the employees in the unit, and since that date, has been recognized by the Respondent. The recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from June 15, 1988, to June 15, 1991.

B. *Refusal to Comply with Contract*

From about October 5, 1989, to November 16, 1990, the Respondent has failed and refused to pay contractually required fringe benefit contributions to the Union's Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan (Funds).

About September 25, 1990, the Respondent entered into an agreement with the Union to pay current monthly contributions to the Funds as they became due. The Respondent further agreed to reimburse the Funds for $67,083.95 in arrearages through weekly payments of $200, commencing November 1, 1990.

Since about October 20, 1990, the Respondent has failed to make its required monthly contributions to the Funds.

Since about November 1, 1990, the Respondent failed to make any weekly payments towards the discharge of its $67,083.95 in arrearages to the Funds.

C. *Failure to Notify Union of Closure or to Engage in Effects Bargaining*

About November 16, 1990, the Respondent closed its Boston facility without prior notice to the Union and without affording the Union an opportunity to bargain about the effects of the closure.[5]

D. *Interference with Employee Rights*

Between November 19 and 26, 1990, after the Respondent closed its Boston facility, either its president, Viarella, or treasurer, So Sun Chow, told employees that it intended to reopen nearby as a nonunion employer.

CONCLUSIONS OF LAW

1. By the acts and conduct described in paragraph II,B, specifically the Respondent's failure to make Fund contributions from approximately October 5, 1989, until its closure about November 16, 1990, as required under the 1988–1991 collective-bargaining agreement, the Respondent has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By the acts and conduct described in paragraph II,C, specifically the Respondent's closure of its Boston facility without prior notice to the Union and without affording the Union an opportunity to bargain about the effects of this closure, the Respondent has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[6]

3. By the acts described above in paragraph II,D, and by each of them, the Respondent has interfered with, restrained, and coerced, and is interfering with,

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[5] The Respondent apparently instituted bankruptcy proceedings on an undisclosed date. (We note that counsel for the General Counsel's May 8, 1990 letter is addressed to the Respondent's ''Trustee in Bankruptcy.'') It is well settled that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction to process unfair labor practice cases. *Katco, Inc.*, 295 NLRB No. 92 (June 30, 1989) (not published in Board volumes).

[6] The Motion for Summary Judgment and supporting exhibits do not indicate that the Union requested bargaining over the effects of the Respondent's closure decision. This failure to request bargaining does not constitute a waiver of the Union's bargaining rights. The Respondent was obligated to provide the Union with preimplementation notice of its closure decision in order to satisfy its effects-bargaining obligation. See *Los Angeles Soap Co.*, 300 NLRB 289 fn. 1 (1990). Instead, the Respondent presented the Union with a fait accompli. *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990). In these circumstances, and in the absence of any special or emergency circumstances justifying the Respondent's failure to provide advance notice of the closure, the Union did not waive its bargaining rights. See, e.g., *Handy Spot, Inc.*, 279 NLRB 1320, 1334 (1986).

restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and the Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make its employees and employee benefit funds whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), for any losses suffered as a result of the Respondent's failure to make required contributions to the Union's Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan,[7] with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 282 NLRB 1173 (1987).[7]

We shall order the Respondent, on request, to bargain with the Union about the effects of its closure of the Boston facility. We shall require the Respondent to pay unit employees laid off or discharged because of the closure their normal wages in accordance with the provisions of *Transmarine Navigation Corp.*, 170 NLRB 389 (1969). Thus, we shall order the Respondent to pay unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on the effects on unit employees of the closure of the Boston facility; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount the employee would have earned as wages from the date on which the Respondent closed its Boston facility to the time the employee secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at a rate of their normal wages when last in the Respondent's employ. Interest on all sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, supra. Finally, in view of the Respondent's closure of its Boston facility, we shall require that the notice be mailed to the employees.

ORDER

The National Labor Relations Board orders that the Respondent, Chrissy Sportswear, Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Boston Joint Board, International Ladies' Garment Workers' Union, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit by failing and refusing from about October 5, 1989, to about November 16, 1990, to make contractually required payments to the Union's Health and Welfare Fund, ILGWU National Retirement Fund, and ILGWU Health Services Plan. The bargaining unit is:

> All nonsupervisory production, maintenance, packing and shipping workers employed by Respondent at its Boston, Massachusetts location, excluding office clerical employees, professional employees, guards and all supervisors as defined in the Act.

(b) Failing and refusing to bargain collectively and in good faith with Boston Joint Board, International Ladies' Garment Workers' Union, AFL–CIO as to the effects on unit employees of the closure of the Respondent's Boston facility.

(c) Interfering with employees' Section 7 rights by advising unit employees that it planned to reopen its closed facility nearby as a nonunion operation.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay the Union's Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan payments that became due under the collective-bargaining agreement from about October 5, 1989, until about November 16, 1990, with interest, as set forth in the remedy section of this decision.

(b) Make whole unit employees for any losses they may have suffered because of the Respondent's failure to make payments to the Union's Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan as required under the collective-bargaining agreement, with interest, as set forth in the remedy section of this decision.

[7] This shall include reimbursing employees for any contributions they themselves may have made, with interest, for the maintenance of any of the Funds after the Respondent ceased making required benefit fund payments. *Concord Metal*, 295 NLRB 912, 914 (1989).

[8] The Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Any additional amounts owed with respect to any funds established in the agreement will be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

(c) Bargain, on request, with the Union regarding the effects of closing the Boston facility.

(d) Pay unit employees laid off or discharged because the Respondent closed its Boston Facility their normal wages for the period set forth in the remedy section of this Decision and Order.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

(f) Mail signed and dated copies of the attached notice marked ''Appendix''[9] to the Union and to all unit employees employed as of the date of the 1989 closing of the Respondent's Boston facility. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt by the Respondent to the last known address of each employee.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and had ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Boston Joint Board, International Ladies' Garment Workers' Union, AFL–CIO as the exclusive representative of the employees in the bargaining unit by failing and refusing from about October 5, 1989, to about November 16, 1990, to make contractually required payments to the Union's Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan. The bargaining unit is:

> All nonsupervisory production, maintenance, packing and shipping workers employed by Respondent at its Boston, Massachusetts location, excluding office clerical employees, professional employees, guards and all supervisors as defined in the Act.

WE WILL NOT fail or refuse to bargain collectively and in good faith with Boston Joint Board, International Ladies' Garment Workers' Union, AFL–CIO as to the effects on you of the closure of our Boston facility.

WE WILL NOT interfere with your Section 7 rights by stating that we plan to reopen our closed facility as a nonunion operation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL pay the Union's Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan amounts that have become due under the collective-bargaining agreement from about October 5, 1989, to about November 16, 1990, with interest.

WE WILL make you whole, with interest, for any losses to you resulting from our failure to make payments to the Union's Health and Welfare Fund, the ILGWU National Retirement Fund, and the ILGWU Health Services Plan, as required under the collective-bargaining agreement.

WE WILL pay unit employees laid off or discharged because of the closure of the Boston facility limited backpay with interest, as required by the National Labor Relations Board.

WE WILL, on request, bargain with the Union regarding the effects of closing the Boston facility.

CHRISSY SPORTSWEAR, INC.